79-1648

No.

Supreme Court, U. S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

GARY THOMAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MAY IT PLEASE THE COURT:

Petitioner, GARY THOMAS, prays that this Court's Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, for review of the judgment of that Court entered pursuant to the opinion presented as Appendix "A" to this Petition.

REFERENCE TO REPORTS

The opinions delivered in the counts below have not been reported in any official or unofficial reporter system.

The Opinion of the Court of Appeals is reprinted as Appendix "A".

STATEMENT OF GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

i. The opinion of the Court of Appeals was rendered on March 19, 1980. The mandate has not issued as yet.

ii. No Petition for Rehearing was filed in this cause.

iii. Jurisdiction is conferred upon the Court by Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the "preponderance of the evidence" standard of proof applied in preliminary determination as to the admission of a co-conspirator's hearsay statements is violative of due process where such determination is made in the course of a bench trial.

2. May the Trial Court properly consider the hearsay statements of a co-conspirator which are the intended statements to be admitted under Rule 801(d)(2)(e), during its preliminary determination as to the existence of the conspiracy.

3. Whether the presumption that the trial court sitting without a jury considers only the admissible evidence in making its determination is valid where the Court has been exposed to numerous hearsay statements during a pre-trial motion just prior to trial.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

i. FED. R. EVID., 801 (d)(2)(E) which provides in relevant part as follows:

> "A statement is not hearsay if it is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

ii. FED. R. EVID. 104(a) which provides in relevant part as follows:

> "Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court; . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."

iii. In this Court, Petitioner places substantial reliance upon the following provision of the Fifth Amendment to the Constitution of the United States:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law;

iv. In this Court, Petitioner places substantial reliance upon the following provision of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

Petitioner was charged with one count of conspiracy in violation of 21 U.S.C. 846 and three counts of the substantive crime in violation of 21 U.S.C. 84(A)(1); the Federal Narcotics Statute. Judgment of conviction was entered on all four counts of the indictment.

The Government called various undercover agents to the stand and they related extensive hearsay statements of the alleged co-conspirator Santori. At the Motion to Quash Arrest and Suppress Evidence, the Trial Court heard extensive hearsay from the alleged co-conspirator. A summary of his statements to the drug agents consists of the following:

1. that his source was a black male;

2. that his source was in traffic court on a given day:

3. that his source's car was inoperable so it was necessary to go to his home in Oak Park, Illinois;

4. at the time of sale he said his source was nearby;

5. at the time of his arrest, Santori states to the arresting agents that Petitioner is his source and that more drugs are in the apartment. With this statement, agents arrest and search petitioner and his home.

Based on this pre-trial evidence, the trial judge found probable cause for the arrest and denied the pre-trial motions.

Again based on this evidence, the trial judge, during the trial, stated for the record that he had determined the existence of the conspiracy and that the statements of co-conspirator Santori would be admitted, exclusive of his post arrest statement naming the Petitioner.

TRIAL COURT DECISION

All of the Motion to Suppress statements of Santori which came on through the testimony of agent Kazman were admitted at trial.

There was no evidence against the Petitioner linking him to the conspiracy or sales other than these hearsay statements of the co-conspirator. The Defendant was sentenced on all four counts to a total of 5 years probation with the first year to be served on a work release program, all sentences on the four counts to run concurrent.

APPELLATE THEORIES OF THE PARTIES

Petitioner appealed his conviction to the Court of Appeals, arguing that there was no probable cause to arrest him. He further argued that the use and admission

of the co-conspirator's statements was error. Finally, he raised the question of whether or not the trial judge considered a hearsay statement clearly inadmissible in reaching his decision. That statement was the post arrest statement of Santori naming the petitioner as his source. While not admitted at trial, petitioner contends that this statement was in the trial judge's mind when deciding the fate of the petitioner.

In response, the government argued that it had proved the petitioner was proven guilty by properly admitted evidence only citing case law to the effect that a judge considers only proper evidence.

The government also asserts that there was a proper determination of the existence of the conspiracy and therefore the statements of Santori were admissible.

THE COURT OF APPEALS DECISION

The conviction was affirmed on the theory that while it was a close case (App. 5) the burden of proof as to probable cause and the existence of the conspiracy were met. The Court of Appeals stated that it is presumed that a trial court considers only properly admitted evidence in reaching its decision.

STATE COURT PROCEEDINGS

The case does not invoke any proceeding in any State Court.

BASIS FOR FEDERAL JURISDICTION

The proceedings below commenced with an indictment returned by a federal grand jury, charging violation of a federal statute. The District Court's original jurisdiction was conferred by Title 28, United States Code, §1355.

REASONS FOR GRANTING THE WRIT

I.

THE USE OF THE PREPONDERANCE OF THE EVIDENCE STANDARD IN THE DETERMINATION OF THE EXISTENCE OF A CONSPIRACY FOR PURPOSE OF ADMITTING CO-CONSPIRATOR STATEMENTS AGAINST THE DEFENDANT, IS A VIOLATION OF DUE PROCESS WHERE THE TRIAL COURT IS SITTING WITHOUT A JURY.

With the advent of the Federal Rules of Evidence came considerable confusion as to the proper manner in which to determine preliminary matters concerning admission of evidence. In particular, petitioner was faced with a preliminary determination as to the existence of a conspiracy. This determination made under Fed. R. Evid. Sec. 104(a) and Sec. 801(d)(2)(E) was necessary so as to allow the admission of otherwise hearsay statements of a co-conspirator. Petitioner's resulting conviction is not a result of the existence of this procedure, but rather on the mechanics of the preliminary determination.

In *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978), the Seventh Circuit adopted a procedure and standard of proof which was already in use in the Second, Third, Fourth and Eighth Circuits.[1] Along with *Santiago*

[1] *Santiago, supra.* at 1135
Second Circuit—*United States* v. *Stanchich*, 550 F.2d at 1297 (2nd Cir. 1977)
Third Circuit—*United States* v. *Trowery*, 542 F.2d at 626 (3rd Cir. 1976)
Fourth Circuit—*United States* v. *Stroupe*, 538 F.2d at 1065 (4th Cir. 1976)
Eighth Circuit—*United States* v. *Bell*, 573 F.2d at 1040 (8th Cir. 1978)

came a shift in procedure. Under Rule 104 the Judge was the sole determinant of admissibility. With this withdrawal of the question from the jury, the Courts of Appeal have found it unnecessary to remain bound by the standard of proof known as "beyond a reasonable doubt" which was previously required. *See United States* v. *Santos*, 385 F.2d 43 (7th Cir. 1967), *cert. denied*, 390 U.S. 954, 88 S.Ct. 1048 19 L.Ed. 2d 1148.

There is some confusion resulting from the use of the terms by the several Courts of Appeals to describe the quantum of proof necessary for the trial judge to admit a co-conspirator's statement. *United States* v. *James*, 590 F.2d 575 (5th Cir. 1979). Some courts use the "prima facie" standard, others refer to a "fair preponderance" of the evidence. Still others require "substantial independent evidence."

While the Sixth Circuit in *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978) adopts the preponderance standard, it does so only after examining contrary opinion. Judge Weinstein in his treatise on evidence (1 Weinstein's Evidence ¶104[05] at 104-44) advocates the employment of the reasonable doubt standard:

> The better procedure would be to require a very high degree of proof before admitting the statement. Only if the court is convinced beyond a reasonable doubt . . . should it admit . . . *supra.* ¶104[05] at 104-44.

Further the Judge states that "exactly what the court test is has not always been made clear."

A test more demanding than the ordinary Civil standard of preponderance was opted for by the Fifth Circuit in

United States v. *James,* 590 F.2d 575 (5th Cir. 1979). There it was held,

> More appropriate to adopt a substantial evidence rule rather than one which requires at that stage of the proceeding, a preponderance of the evidence.

James, supra at 581 citing with approval *United States* v. *Nixon,* 418 U.S. 683, 94 S.Ct. 3090 41 LEd 2d 1039 (1974), where it is said that "as a preliminary matter there must be sufficient independent evidence of a conspiracy at least enough to take the case to question to the jury. *Nixon, supra* at 701 n. 14.

Petitioner believes that this Court should find a real danger in the use of a standard less than reasonable doubt. That danger is increased where the trial court sits without a jury to determine facts. As a practical matter, the trial judge hears the evidence as to admission and determines as a matter of law that a conspiracy exists so as to allow co-conspirator's statements into the record. Under the preponderance of the evidence standard, the Judge may do so finding only that it is more likely than not that the declarant and the defendant were members of a conspiracy when hearsay statements were made and statements were made in furtherance of a conspiracy. *Santiago, supra* at 1134. At the end of the trial it would be for the judge to find the facts to determine the existence of a conspiracy and defendant's guilt under the Conspiracy Statute. The inconsistency and unlikelihood that the judge would contradict himself is apparent. The inconsistency of the finding of not guilty is controlled only by the judge rendering a consistent guilty verdict. The same issues at the preliminary determination are decided by the judge again at the close of the trial evidence. Where no other direct or convincing circumstantial evidence is available to the trial

court, as is in the petitioner's case, a defendant facing trial by the bench is denied due process of law and his right to be found guilty only as against the standard beyond a reasonable doubt. Where a trial judge is allowed to determine a defendant's participation and existence in and of a conspiracy by a standard less than that of a reasonable doubt, the defendant is denied a fundamental constitutional right. For this reason the Court should examine the propriety of any standard which is less than beyond a reasonable doubt, in particular the use of the preponderance test.

II.

THE DEFENDANT IS DENIED HIS RIGHTS TO DUE PROCESS AND CONFRONTATION OF WITNESSES AGAINST HIM WHEN THE TRIAL COURT IS ALLOWED TO USE THE VERY STATEMENTS IT SEEKS TO ADMIT UNDER THE EXCEPTION OF 801(d)(2)(E) IN THE HEARING TO DETERMINE THE EXISTENCE OF THE CONSPIRACY.

Petitioner expresses grave doubt as to the propriety of the "bootstrapping" approach to evidence. The Circuits are in direct controversy and conflict on this point. Some Circuits hold that the very statements sought to be admitted may be used at the Rule 104 determination hearing. *United States* v. *Martorano,* 557 F.2d 1 (1st Cir. 1977), *United States* v. *Vinson,* 606 F.2d 149 (6th Cir. 1979). These Courts based their decision on the language of Rule 104 which states: "That the Court in determining the preliminary questions is not bound by the rules of evidence except those with respect to privileges." Clearly the Rule meant to say that other hearsay or other evidence which would be objectionable in nature if sought to be admitted

at trial, could be brought to the Court's attention in this preliminary hearing, but could it be said that the drafters of this Rule intended to allow the use of the very statements to be admitted under the hearsay exception to prove the existence of the conspiracy. Allowance of the hearsay runs counter to this Court's pronouncement in *Glasser* v. *United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 467 86 LEd 680, 701 (1942). Decided prior to the enactment of the Federal Rules of Evidence, *Glasser* held that:

> Declarations by a member of a conspiracy are admissible over the objections of an alleged co-conspirator who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence. 315 U.S. at 74-75, 62 S.Ct. at 467.

In *Nixon, supra* this Court in a footnote stated that as a preliminary matter "there must be substantial, *independent,* evidence of a conspiracy at least enough to take the question to a jury." 94 S.Ct. at 3104, n. 14.

The Fifth Circuit in *James* adopts the cautionary words of this Court. The Fifth Circuit refused to interpret the language of Rule 104, which provides that the Rules of Evidence are not binding in a 104 determination, as permitting the Court to rely upon the content of the very statements whose admission is at issue.

> We adhere to our requirements established in *Apollo* that fulfillment of the condition of admissibility must be established by evidence independent of the conspiracy statements itself. *James* at 581.

Similarly in *United States* v. *Ziegler,* 583 F.2d 77, 79 (2d Cir. 1978) the Second Circuit holds that

> The existence of a conspiratorial relationship between declarant and defendant must be established aliunde by independent evidence before the declarant's statements are admissible against the defendant. This rule rests on principals of the law of agency, where the existence of the agency relationship can not be proved by the alleged agent's own bootstrap assertions. *Ziegler* at p. 79.

The Fifth, Eighth and Tenth Circuits also opt for this independent evidence and hold that the statements themselves should not be used in the preliminary determination. *See United States* v. *Oliva,* 497 F.2d 130 (5th Cir. 1974); *United States* v. *Alvarez,* 584 F.2d 694, 697 (5th Cir. 1978); *United States* v. *Macklin,* 573 F.2d 1046, 1048 n.2 (8th Cir. 1978); *United States* v. *Andrews,* 585 F.2d 961, 966 (10th Cir. 1978). The Seventh Circuit in *Santiago,* expressly reserved decision on this point. *Santiago, supra* 1133 n. 11.

In view of the direct conflict between the Circuit Court of Appeal as to the use of the hearsay statement in a bootstrapping matter, this Court should resolve the dispute so as to promote a more uniform interpretation and application of the Federal Rules of Evidence. This would be in keeping with the goal of the Federal Rules to provide a uniform tool of administration throughout the Federal system. Only when consistent application and interpretation of the rules is a fact, can the rules be the effective tool they were designed to be. Such consistency on this question can only be resolved by this Court's determination and resolution.

III.

THE COURT OF APPEALS SHOULD NOT BE ALLOWED THE LUXURY OF A PRESUMPTION UPON WHICH IT CAN BASE THE AFFIRMANCE OF THE LOWER COURT'S CONVICTION WHERE SUCH PRESUMPTION RUNS COUNTER TO COMMON SENSE.

The Court of Appeals stressed reliance on the presumption that the trial judge did not consider the post-arrest implication statement of Santori (App. p. 8, n. 1). The Appellate Court relies upon *United States* v. *Krol*, 374 F. 2d 776 (7th Cir. 1967) for its support of the presumption. However this presumption is inapplicable to the petitioner's case. In *Krol*, the Court made an affirmative disavowal of the use of hearsay evidence. The trial court in petitioner's case said only that they considered all of the evidence in open court (Tr. 46 and 47). It is likely that the judge was including the preliminary hearing evidence as well. At this hearing the hearsay implication was put before the court. Petitioner argues to this court that the presumption is unfounded in common sense and law where the trial court has heard extensive evidence most of which was inadmissible hearsay in a Motion just two weeks prior to trial. If this presumption is to be allowed in the law it should be restructured so as not to place the burden upon the defendant to point out affirmative remarks regarding inadmissible evidence. The defendant who suffers at the hand of a trial court which does not articulate the basis upon which it renders its finding is greatly prejudiced by this presumption. Such prejudice goes to his right to a fair trial. The case against the petitioner was buttressed by this presumption for closing the possibility of attack by the petitioner. To forbid use of this support could tumble the Court of Appeals' structure on which it affirms

the finding of reasonable doubt. This Court should re-examine the use of such presumptions in that they run counter to constitutional notions of due process and a right to a fair trial.

CONCLUSION

In that each question presented reflects substantial and important questions that merit consideration by this Court because of their impact on Federal criminal trials, it is respectfully urged that this Petition be granted and that this Court review each of the questions presented; and thereafter vacate the instant convictions with directions that the case be tried anew.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued: December 5, 1979
March 19, 1980
Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1592 vs.

GARY THOMAS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 CR 101—NICHOLAS J. BUA, *Judge*.

ORDER

[Unpublished Order Not To Be Cited Per Circuit Rule 35]

On this appeal, appellant challenges his conviction of one count of conspiracy to distribute phencyclidine (PCP), a controlled substance, in violation of 21 U.S.C. §846 (1970), and three counts of distributing the drug in violation of 21 U.S.C. §841(a)(1) (1970). Appellant com-

plains there was no probable cause for his arrest or the search of his apartment, insufficient "exigent circumstances" to justify the warrantless entrance and search of his apartment, insufficient independent evidence of a conspiracy to justify the admission of the hearsay statements of his alleged co-conspirator, and insufficient admissible evidence to support his conviction. We will address each of appellant's arguments in turn.

PROBABLE CAUSE

At a pre-trial hearing on appellant's motions to quash the arrest and suppress the seized evidence because of a claimed lack of probable cause, the trial judge heard substantial evidence indicating the arrest and seizure were justified. Agent Richard C. Kazimar testified he had purchased PCP from appellant's co-conspirator, John Santori, at which time Santori had indicated his source was waiting nearby and that he had to return to his source immediately with the money from the sale. After leaving the agent's car with the money, Santori went directly to appellant's car in which appellant was waiting nearby. After meeting with appellant, Santori went to a public transit station and appellant was followed to his apartment at 222 West Washington Street, in Oak Park. In the course of dealing with the agent at a later date, Santori indicated that his source was a black male and that the source was in traffic court on a certain day. Appellant, a black male, was seen on the specified day leaving traffic court. On still another occasion, Santori told the agent that they had to travel to Oak Park to pick up a quantity of PCP the agent was to purchase from Santori because Santori's source's car was inoperable. After arriving in Oak Park, Santori walked east on Washington Street toward appellant's apartment. Lastly, and most importantly, upon his arrest, Santori stated that appellant was the

source for the PCP, that appellant was in his apartment waiting for Santori's return with the money, and that appellant might have more PCP in his apartment.

There can be little doubt that this evidence was sufficient to cause a person "of prudence and caution in believing that the offense has been committed. . . ." *Carroll* v. *United States,* 267 U.S. 132, 161 (1925) (citation omitted), and that appellant was, most likely, Santori's source. Appellant segregates each element of the evidence known to the agents and cites numerous cases to the effect that each element taken separately was insufficient to warrant a finding of probable cause. This ignores, of course, that the agents had the sum total of the above information available to them. We believe this sum total gave the agents probable cause to believe an offense was being committed. We, therefore, find no error in the trial court's denial of appellant's motions to quash the arrest and suppress the evidence obtained at that time.

EXIGENT CIRCUMSTANCES

Upon his arrest, Santori told the agents that appellant lived at 222 West Washington and that appellant was waiting for Santori's return with the proceeds of the PCP sale. He also stated that additional PCP might be found in the apartment. Based upon this information, the agents went directly to the apartment and knocked on the door. Appellant answered by asking "Is it John?" When the agents informed appellant that it was not John, that it was the police and that appellant should open the door, appellant failed to open the door and the agents heard what they thought was movement in the interior of the apartment. After knocking and demanding entrance at least two more times, the agents forcibly entered the apartment.

In our opinion there were sufficient exigent circumstances to justify the warrantless entrance and search of appellant's apartment. The amount of time it would have taken the agents to return to Chicago to obtain a search warrant after arresting Santori, even though done as expeditiously as possible, most certainly would have alerted appellant that trouble was afoot, given the fact that he was waiting for Santori's immediate return with the money. Appellant had previously revealed concern over such occurrences by his practice of being near the scene of a drug transaction and demanding that Santori come directly from the transactions with the proceeds. A delay in the agent's search would have allowed appellant to destroy, or, at least, prepare for destruction whatever PCP remained in the apartment. *See United States* v. *Rubin,* 474 F. 2d 262, 268-69 (3d Cir. 1973), *cert. denied sub nom. Agran* v. *United States,* 414 U.S. 833. Thus, we find it was reasonable for the agents to have proceeded directly from Santori's arrest to appellant's apartment. We also find it was reasonable for the agents to have forcibly entered the apartment after appellant's failure to open the door, in order to prevent the destruction of evidence that might be inside and to prevent appellant's escape. As stated above, appellant was alerted to the fact that it was the police seeking entrance to his apartment and it was reasonable for agents to assume that the movement they heard from the interior was not for the purpose of cooperating with the law enforcement officers. Appellant's argument that his apartment was under surveillance and that he therefore could not have escaped ignores the potential destruction of the PCP. Further, we do not believe the agents should be required to rely upon their safety valve procedures to capture the appellant once an escape had been attempted.

EVIDENCE OF THE CONSPIRACY

Appellant next complains that there was insufficient independent evidence of the alleged conspiracy between himself and Santori to justify the admission of Santori's statements against appellant under the "co-conspirators" exception to the hearsay rule. Fed. R. Evid. (801)(d)(2)(E). As this court stated in *United States* v. *Santiago,* 582 F. 2d 1128, 1134-35 (7th Cir. 1978), the Government must prove the existence of the conspiracy by a preponderance of independent evidence. *See also United States* v. *Dalzotto,* 603 F. 2d 642, 644 (7th Cir. 1979), *cert. denied sub nom. Young* v. *United States,* ..... U.S. ....., 100 Sp. Ct. 530. While this may be a close case, we met the minimum proof required of it in this case.

The independent evidence in the present case shows that after the first PCP cash transaction, Santori left the agent's presence and went directly to the nearby automobile of the appellant, entered the automobile, and conversed with the appellant. It is reasonably inferable from Santori's conduct following the sale, at which he received $1800 in currency, that the meeting with the appellant was not just a happenstance one but was pursuant to advance arrangement. The appellant was thereafter observed driving a short distance, and after letting Santori out of his car, the appellant drove on to and entered his residence. After the February 7 transaction with Santori, in which he received $11,500, the agents proceeded immediately to the appellant's apartment and after knocking heard him say through the closed door, "Is it John?" Santori's first name was John. Again, there is a reasonable inference of a prearranged meeting immediately following the illegal sale.

This evidence, while arguably not sufficient to establish a conspiracy beyond a reasonable doubt, was sufficient under the *Santiago* preponderance test to be the basis of the trial judge reasonably finding the existence of the conspiracy "more likely than not," *United States* v. *Petrozziello,* 548 F. 2d 20, 23 (1st Cir. 1977). The higher standard, of course, is not applicable.

THE SUFFICIENCY OF THE EVIDENCE

Appellant lastly complains that there was insufficient admissible evidence of appellant's alleged violations to have found him guilty beyond a reasonable doubt. Viewing the lower court's judgment in the light most favorable to the Government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), we must disagree.

Initially, it must be noted that in addition to the evidence of the conspiracy mentioned above, the trial judge also had before him all the properly admitted hearsay statements and explanations by Santori.[1] These statements included Santori's description of his source as a black male, the fact that his source was nearby during the drug transactions, the fact that his source was in traffic court on a certain day, and that his source lived in Oak Park. All this information corresponds with facts known about the appellant. In addition, as stated above, appellant was in possession of further amounts of PCP and of money previously given by the agents to Santori. *See Wilson* v. *United States,* 162 U.S. 613, 619 (1896).

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[1] It is presumed, of course that the trial judge considered only the properly admitted evidence in rendering his decision, *United States* v. *Krol,* 374 F.2d 776, 779 (7th Cir. 1967), *cert. denied,* 389 U.S. 835; *i.e.,* that he did not rely upon Santori's post arrest implication of appellant.

The sum of this evidence clearly established the agreement between and common actions by appellant and Santori, *see United States* v. *Herrera,* 407 F.Supp. 766 (N.D. Ill. 1975), although each factor taken individually may not have been adequate. *Compare United States* v. *Pratt,* 429 F.2d 690 (3d Cir. 1970). In light of this evidence, we cannot disagree with the conclusions reached by the trial court. The conviction, therefore, is

AFFIRMED.